(3)

No. 88-1711

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

DONALD PRUESSMAN,

Petitioner,

vs.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ, M.D.; MICHAEL ROBINSON,

Respondents.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI BY RESPONDENTS, CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; AND RICHARD J. NAUE, JR.

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RESTATED QUESTION PRESENTED FOR REVIEW

Whether the lower courts correctly utilized discretionary functions and *"wise judicial administration"*, by dismissing an egregiously neglected Federal claim in deference to an actively prosecuted concurrent State Court claim containing identical operative facts and seeking substantially similar recovery.

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DONALD PRUESSMAN,

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GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ, M.D.; MICHAEL ROBINSON,

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI BY RESPONDENTS, CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; AND RICHARD J. NAUE, JR.

Your Respondents, CITY OF CORAL GABLES, (hereafter "CITY"), KEN BUSH, R. POOR, D. MOORE, and RICHARD J. NAUE, JR. (hereafter "OFFICERS"),

respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari which seeks review of the *per curiam* decision of the Eleventh Circuit Court of Appeals in affirming the District Court's dismissal of a Federal lawsuit, as said litigation was egregiously neglected and claimant (hereinafter "PRUESSMAN") actively elected to advance his concurrent state cause of action that was based upon identical operative facts, involves identical parties, and seeks substantially similar recovery.

OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals Eleventh Circuit Denying Appellant, PRUESSMAN'S, Petition for Rehearing appears at Appendix, page A-2.

The opinion of the United States Court of Appeals Eleventh Circuit on Appeal from United States District Court, Southern District of Florida appears at Appendix, page A-3.

The Order Denying Motion to Vacate Order of Dismissal of United States District Court, Southern District of Florida appears at Appendix, page A-6.

The Order of Dismissal of the United States District Court, Southern District of Florida appears at Appendix, page A-7.

The opinion of the United States Court of Appeals, Eleventh District, Affirming the Dismissal of the District Court is a non-published decision reported at 865 F.2d 1272.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondents, CITY and OFFICERS, set forth the following additional facts and relevant matters.

On May 28, 1982, the CITY responded to a call from medical personnel at DOCTORS HOSPITAL concerning PRUESSMAN who refused to leave the hospital even though he was medically discharged. During his admission, PRUESSMAN exhibited aberrant behavior and threatened nurses and other patients. Pursuant to applicable Florida Statute[1] a psychiatric examination of PRUESSMAN was conducted by DR. GORDON LEWIS, and a certified report was executed confirming that

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[1] FLA. STAT. § 394.463(1)(b)(3) (1982). Emergency admission. – (a) Criteria – A person may be admitted to a receiving facility on emergency conditions if there is reason to believe that he is mentally ill and because of his illness is:

1. Likely to injure himself or others if allowed to remain at liberty;

(b) Initiation of proceeding – An emergency admission may be initiated as follows: (3) A mental health professional may execute a certificate that he has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for emergency admission, stating the observations upon which that conclusion is based. The mental health professional's certificate shall authorize a law enforcement officer to take the person into custody and deliver him to the nearest available receiving facility for emergency examination and treatment. The law enforcement officer shall execute a written report detailing the circumstances under which the person was taken into custody. The report and mental health professional's certificate shall be made a part of the patient's clinical record.

PRUESSMAN was mentally ill and was likely to injure himself or others unless immediately detained.[2]

The "Report of Law Enforcement Officer" portion of the certificate, confirming PRUESSMAN'S mental incapacity and dangerous propensity was completed. These findings reiterated support for the position that PRUESSMAN was a proper candidate for transfer to an appropriate facility for emergency admission.

Upon advise of GLENN FALK, counsel for CITY and OFFICERS, and based upon the executed certificate of mental health professional thereby vesting authority in the law enforcement personnel pursuant to the aforestated statute, OFFICERS transported PRUESSMAN by ambulance to the receiving facility at COMMUNITY HEALTH OF SOUTH DADE, INC.

In addition to the certificate prepared by DR. LEWIS corroborating PRUESSMAN'S mental illness, the medical records available at DOCTORS HOSPITAL confirm PRUESSMAN'S threatening, bizarre, and dangerous behavior. These records and a myriad of other documentation reveal that PRUESSMAN has suffered from chronic and permanent psychiatric illness for a period of at least ten (10) years preceding the subject incident.

PRUESSMAN claims that during the four (4) years following this incident he was unable to initiate litigation and advance his claim because of ". . . illness and difficulties in obtaining affordable counsel . . .".[3] This

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[2] *See* Appendix, page A-9.

[3] *See* PRUESSMAN'S Writ of Certiorari at page 10.

representation is totally misleading, for in truth PRUESSMAN persistently brought proceedings and initiated inquiries concerning exactly the same operative facts before no less than six (6) official agencies and officers.[4] On each occasion PRUESSMAN'S allegations were thoroughly investigated and summarily dismissed.

Nevertheless, on May 28, 1986, four years following the subject incident and on the very day when the Statute of Limitations was to run, PRUESSMAN filed lawsuits in the State and Federal Court forums. These lawsuits alleged identical operative facts, parties, and damages.

Subsequent to the simultaneous filing of the State and Federal lawsuits, PRUESSMAN totally neglected the Federal claim for a time period in excess of nineteen (19) months. During this time, however, PRUESSMAN deliberately chose to pursue, in an active fashion, his State Court lawsuit. Noting that there was an absence of activity in the Federal lawsuit[5] and PRUESSMAN'S failure to

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[4] Those Agencies / Officers and related information is as follows: 1.) Health and Rehabilitative Services – June through September, 1984, (resolved); 2.) State Attorney's Office – June through August, 1984, (dismissed); 3.) Dade Monroe Mental Health Board – June 28, 1983, (resolved); 4.) Human Rights Advocacy Committee – October through November, 1983 – January 1985, (resolved); 5.) Coral Gables Chief of Police – December 1983, (resolved); 6.) Florida Governor Bob Graham's Office – June through August, 1984, (resolved).

[5] *See* FED. R. CIV. P. 4.(j) "Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion . . . "

effect service of process[6] the District Court, on October 2, 1987, entered a *sua sponte* Order to show cause why PRUESSMAN'S Federal claim should not be dismissed.

On November 24, 1987, the District Court Judge quashed the Order to Show Cause; however, he specifically ruled that PRUESSMAN was to effect service upon all Defendants within forty-five (45) days or proceed *in forma pauperis*, and further that the prosecution of the case was to be advanced "EXPEDITIOUSLY".[7]

PRUESSMAN has alleged in his petition that "service was effected on all parties".[8] Again, PRUESSMAN has made significant misstatements of fact. The record is clear that PRUESSMAN flouted the District Court's Order by failing to effect service of process on the CITY, and by failing to serve no less than nine (9) of the other named Defendants.

On January 25, 1988, CITY and OFFICERS filed a Motion to Dismiss and/or Abate/Stay the Federal claim and raised the aforedescribed defenses as justification for

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[6] *See* Fed. Proc. Rules Service, Southern District Florida, Rule 13, "Dismissal for Want of Prosecution. Civil actions not at issue which have been pending without any proceedings having been taken therein for more than three months may be dismissed for want of prosecution by the Court on its own motion after notice to counsel of record. Such actions may also be dismissed for want of prosecution at any time on motion by any party upon notice to the other parties."

[7] Order appears at Appendix, page A-21 of PRUESSMAN'S Petition for Writ of Certiorari.

[8] *See* PRUESSMAN'S Writ of Certiorari at pages 13, 15, 19, & 21.

the dismissal. Additional reasons supporting a dismissal of PRUESSMAN'S Federal claim were raised by other party Defendants, and on February 8, 1988, the District Court entered an Order Dismissing the Federal forum lawsuit.[9]

In dismissing the Federal Complaint, the District Judge specifically noted that he considered a "careful review of the record" and that "particularly in light of the Plaintiff's egregious failure to prosecute this case, the Court will treat the Plaintiff as having elected to pursue his remedies in State Court."[10]

In response to PRUESSMAN'S Motion to Vacate Order of Dismissal, CITY and OFFICERS filed an appropriate Responsive Brief and Memorandum of Law. Subsequently, the District Court denied the Motion to Vacate Order of Dismissal and PRUESSMAN sought an appeal before the Eleventh Circuit. In response to this appeal to the Eleventh Circuit, CITY and OFFICERS filed an Answer Brief on July 8, 1988.

The Eleventh Circuit Court of Appeal affirmed (*per curiam*) the District Court's dismissal after "having given particular weight to the progress of the litigation in state court and the exceptional circumstances constituting PRUESSMAN'S 'egregious failure to prosecute the case' ".[11] It is upon the outcome of the appeal to the

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[9] District Court's Order of Dismissal appears at Appendix, page A-7.

[10] *Id.*

[11] Opinion of United States Court of Appeals affirming District Court's dismissal appears at Appendix, page A-3.

Eleventh Circuit that PRUESSMAN has sought a Writ of Certiorari before this Court.

SUMMARY OF ARGUMENT

1). There is no basis for granting the Writ of Certiorari since the lower court correctly employed 'wise judicial administration' by dismissing the Federal claim in deference to the parallel State Court action.

2). The action of the lower court does not warrant the granting of a Writ of Certiorari by this Court. The dismissal of the Federal claim was an action well within the inherent power of the District Court Judge and was based upon PRUESSMAN'S clear and consistently egregious failure to prosecute his Federal lawsuit.

ARGUMENT IN SUPPORT OF DENYING THE WRIT OF CERTIORARI

A). IN THE INTEREST OF FEDERAL-STATE COMITY AND IN DEFERENCE TO AN ADVANCED PARALLEL STATE COURT ACTION THE DISMISSAL OF PRUESSMAN'S COMPLAINT CONSTITUTES THE USE OF 'WISE JUDICIAL ADMINISTRATION'.

Section 1983[12] actions were created to provide redress for civil rights violations in the wake of the Civil Rights Act of 1871. There existed a need for a vindication of rights jeopardized initially by certain social elements existing principally in Southern states in the post Civil

[12] Title 42 USC § 1983.

War era. Civil enforcement to protect these rights was the remedy envisioned by Congress. Indeed, where there has been injury or damage committed under color of State law to a person or his constitutional rights then civil remedies are in order.

However, these actions are not to be considered an unbridled right to engage warrantless litigation against parties who are entitled to immunity in the performance of their civic responsibilities. Courts throughout our land have steadfastly held that local police officers and agencies enjoy a "good faith and probable cause" defense to § 1983 claims.[13] This doctrine of official immunity for the police officer is based upon concern that a threat of personal liability would adversely affect the officer's decision making process, and would deter his willingness to execute his duties with the decisiveness, judgment, and interest in protecting the public good.[14]

The OFFICERS who took PRUESSMAN into custody for transfer to an appropriate facility obviously conducted themselves in good faith, and without question were operating under probable cause. Pursuant to applicable Florida Statute[15] the OFFICERS noted that a qualified expert, DR. LEWIS, acknowledged PRUESSMAN'S

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[13] Pierson v. Ray, 386 U.S. 547 (1967).

[14] Scheuer v. Rhodes, 416 U.S. 232 (1974). *See also*, Wood v. Strickland, 420 U.S. 308 (1975), (which identifies an additional justification for extending qualified immunities to public officials: the fear of personal liability may deter individuals from holding official positions).

[15] *Id*, at note 1 (also referred to as the "Baker Act").

mental illness.[16] This medical expert completed the report certifying that PRUESSMAN fit the profile contemplated for commitment under the "Baker Act".

The 'Report of Law Enforcement Officer' aspect of the certificate was properly completed contrary to PRUESSMAN'S assertions.[17] In addition to these personal observations and the instructions from DR. LEWIS, the OFFICERS' good faith is further bolstered because they did not commence the transfer of PRUESSMAN until they had received and relied upon advise from their legal counsel, GLENN FALK.[18]

It has been recognized that both State and Federal Courts have jurisdiction to resolve grievances concerning § 1983 claims.[19] The issue before this Court is whether the lower courts properly exercised discretion in dismissing

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[16] *See* Appendix at page A-9. (Physicians certificate confirms "[i]n my opinion this person (PRUESSMAN) appears to be mentally ill and is likely to physically injure himself or others unless immediately detained . . . ").

[17] *Id.*

[18] Although the facts at issue reveal an absolute showing of the OFFICER'S good faith in the performance of their duties based upon their reliance of Florida Statutes, the certificate of the mental health expert, and their own observations, there is additional indicia of good faith shown upon this reliance of advise from counsel. *See* Wentz v. Klecker, 721 F.2d 244 (8th Cir. 1983); Tanner v. Hardy, 764 F.2d 1024 (4th Cir. 1985); Watertown Equipment Company v. Norwest Bank Watertown, N.A., 830 F.2d 1487 (8th Cir. 1987).

[19] Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), *aff'd*, 471 U.S. 261 (1985); Carter v. City of Emporia, 815 F.2d 617 (10th Cir. 1987).

the Federal claim and yielding jurisdiction to the parallel State Court. There are several principal reasons in support of the District Court's dismissal of PRUESSMAN'S Complaint. One such reason in support of the dismissal concerns the principles of comity given to the State Court forum. Another reason, closely related is PRUESSMAN'S obvious failure to adhere to the rules and dictates of the Federal forum.

Focusing on the dismissal based upon principles of comity it is to be noted that there are valid circumstances that allow a Federal § 1983 claim to be dismissed in deference to a parallel State action. The litmus test in justifying a dismissal of a Federal § 1983 claim in favor of a State Court forum has been identified as the use of " '[w]ise judicial administration' ".[20]

The Court in *Colorado River* initially defined 'wise judicial administration' by enumerating several elements used to justify a dismissal of a Federal claim in deference to a State claim.[21] These suggested criteria were further expanded by the Court when there exists an "absence of any substantial progress in the Federal Court litigation".[22]

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[20] Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976) *quoting* Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183 (1952).

[21] These factors include 1) whether one court has assumed jurisdiction over the subject property; 2) the inconvenience of the Federal forum; 3) the potential for piecemeal litigation; and 4) the order in which jurisdiction was obtained by the forums.

[22] Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 16 (1983).

The fact that PRUESSMAN'S Federal claim lay completely dormant for nineteen (19) months while he actively pursued his concurrent State Court remedies warrants dismissal of the Federal claim in the exercise of wise judicial administration. The record clearly reveals that only after the threat of a *sua sponte* Order to show cause why the lawsuit should not be dismissed did PRUESSMAN attempt to serve any of the party Defendants; and, to this date, almost three years after the filing of the Federal forum action, PRUESSMAN has failed to accomplish this requisite task.

A further element in the test to determine the priority of judicial forums involves inquiry into whether concurrent proceedings produce piecemeal litigation. It is recognized that "piecemeal litigation and some duplication of judicial effort is the unavoidable price of preserving access to the Federal relief which section 1983 assures."[23] Nevertheless, when 1) both actions are parallel, 2) the State forum is fully capable of adjudicating all rights of the parties, and 3) the State forum is significantly more advanced than the Federal forum, reason dictates that wise judicial administration would be best served by dismissing the duplicitous Federal forum claim.

PRUESSMAN has raised concern about a resolution of his declaratory judgment claim. The filing of a declaratory judgment action, as sought by PRUESSMAN, does not automatically confer jurisdiction. To the contrary,

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[23] Signad, Inc. v. City of Sugar Land, 753 F.2d 1338, 1340 (5th Cir. 1985), *citing* Tovar v. Billmeyer, 609 F.2d 1291, 1293 (9th Cir. 1980).

relief is a remedy which is left to the sound discretion of the District Court.[24]

When a proceeding is pending in a State Court where all the matters in controversy between the parties can be fully adjudicated a declaratory judgment action in Federal Court is an "interference with the orderly and comprehensive disposition of a State Court litigation" which should be avoided.[25] In fact, this Court has aptly recognized that "it would be uneconomical as well as vexatious for a Federal Court to proceed in a declaratory judgment suit where another suit is pending in a State Court presenting the same issues, not governed by Federal law, between the same parties."[26] Accordingly, there is no issue upon which this Court should grant PRUESSMAN'S Writ.

B). PRUESSMAN'S EGREGIOUS FAILURE TO PROSECUTE THE FEDERAL CLAIM CONSTITUTES JUSTIFICATION FOR DISMISSAL.

After having egregiously neglected the Federal claim for over nineteen (19) months in derogation of Federal

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[24] *See*, Public Service Commission v. Wycoff Co., 344 U.S. 237 (1952); Skelly Oil Co., v. Phillips Petroleum Co., 339 U.S. 667 (1950); Mission Insurance Co. v. Puritan Fashions Corp., 706 F.2d 599 (5th Cir. 1983).

[25] Brillhart v. Excess Insurance Co. of America, 316 U.S. 491, at 495 (1942); *compare*, City Federal Savings & Loan Association v. Dominion Federal Savings & Loan Association, 657 F. Supp. 477 (S.D. Fla 1987).

[26] *Id*, at 495. *Accord*, Angora Enterprises, Inc. vs. Condominium Association of Lakeside Village, 796 F.2d 384 (11 Cir. 1986).

Procedure,[27] the District Court allowed PRUESSMAN one final opportunity to show good faith and cure his recalcitrance. The District Judge directed PRUESSMAN to effect service of process on all Defendants within forty-five (45) days and specifically instructed him to proceed with the case "EXPEDITIOUSLY".

PRUESSMAN has consistently alleged in his Writ that he has complied with the District Court's Order to effect service upon all Defendants within the forty-five (45) day time period.[28] However, these statements are totally inaccurate. PRUESSMAN admits that he attempted service on the CITY by employing Federal Rule of Civil Procedure 4(c)(2)(C)(ii). The use of this method of service upon a municipality, however, is improper and invalid since the correct rule requires personal service upon the chief executive officer.[29]

The word "delivery" in Rule 4.(d)(6) has been construed to mean personal service.[30] In fact, this Court has

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[27] *See* FED R. CIV. P. 4.(j) *supra* at note 5.

[28] PRUESSMAN'S Writ of Certiorari at page 13 " . . . pursuant to Rule 4(c)(2)(C)(ii), service was effected on all defendants . . . ". *See also supra* at note 9.

[29] FED. R. CIV. P. 4.(d)(6) states that service *shall* be made as follows: "[u]pon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant" (emphasis added).

[30] 46 F.R.D. 101, 114.

confirmed that "where a particular method of serving process is pointed out by statute that method *must* be followed" (emphasis added).[31] The method of service used by PRUESSMAN was certified mail, which has been held to be inadequate when personal service is warranted.[32] Accordingly, PRUESSMAN failed to follow procedures for effecting service upon the CITY as outlined by Federal and State law.[33]

PRUESSMAN has further acknowledged that he attempted service upon the OFFICERS by utilizing those methods identified in Federal Rule 4.(c)(2)(C)(ii). However, as reflected on PRUESSMAN'S "Schedule of Service"[34] the acknowledgment forms were not returned on at least eleven (11) Defendants. Applicable rules provide that "[i]f no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint *shall* be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3)" (emphasis added).[35] Not only does PRUESSMAN'S egregious neglect of the Federal claim and his failure to comply with the District Court's Order

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[31] Amy v. City of Watertown, 130 U.S. 301 (1889).

[32] North Allegheny Joint School System v. Secretary of Health, Education & Welfare, 196 F. Supp. 114 (W.D. Pa. 1961).

[33] The prescribed manner of service upon a municipality in Florida is defined in FLA. STAT. § 48.111, which appears at Appendix, page A-10.

[34] *See* PRUESSMAN'S Writ of Certiorari at Appendix, page A-38-39.

[35] FED. R. CIV. P. 4.(c)(2)(C)(ii).

to effect proper service and prosecute the case "EXPEDITIOUSLY" warrant dismissal, but the obvious consequence of the failure to effect service within the rules of procedure constitutes a lack of personal jurisdiction over the Defendants.[36]

PRUESSMAN admits that the deliberate failure to prosecute this Federal claim reflects egregious behavior.[37] When there exists a failure to prosecute a claim, a Federal District Judge may impose sanctions including a dismissal of the lawsuit.[38]

The rulings of this Court confirm that the District Court is couched with an "inherent power" to dismiss a cause of action for a Plaintiff's failure to prosecute a claim.[39] This sanction is recognized as necessary "in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts."[40] The District Court did not abuse its discretion by dismissing the Federal claim and there is no cause to review this dismissal since the facts at issue present a "clear record of delay."[41]

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[36] *Compare* Jackson v. Hayakawa, 682 F.2d 1344 (9th Cir. 1982); Amen v. City of Dearborn, 532 F.2d 554 (6th Cir. 1976).

[37] PRUESSMAN'S Petition for Writ of Certiorari at page 38 "[a]dmittedly, there has been egregiousness associated with this case".

[38] FED. R. CIV. P. 41.(b), provides that involuntary dismissal is proper "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court . . . ".

[39] Link v. Wabash Railroad Co., 370 U.S. 626, 737 (1962).

[40] *Id.* at 629.

[41] Dismissal is appropriate where there is a clear record of delay. Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985), *quoting* Jones v. Graham, 709 F.2d 1457, 1458 (11th Cir. 1983).

PRUESSMAN, nevertheless, claims to "seek no special favors"[42] and states that a deprivation of his civil rights will occur as a result of the dismissal of his Federal lawsuit The lower courts have shown this self proclaimed "judicial indigent"[43] extensive latitude which he has deliberately flaunted. He intentionally discharged his legal counsel and has voluntarily sought to proceed with his claims *pro se*[44]. Indeed, PRUESSMAN will not be deprived of an opportunity to air his grievance since the State forum is fully capable of determining the rights of all parties to this lawsuit. The lower court's dismissal of the Federal claim was proper especially given PRUESSMAN'S progress in the State Court proceeding and the exceptional circumstances constituting the egregious failure to prosecute the Federal litigation.

CONCLUSION

The Writ for review by this Court should not be granted since the lower courts correctly employed wise judicial administration in dismissing the egregiously malprosecuted and dormant Federal claim in deference to the advanced parallel State Court action. Moreover, the State

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[42] PRUESSMAN'S Writ of Certiorari at page 42.

[43] *Id.* at page 44.

[44] The *pro se* status of PRUESSMAN should not cause him to fare better than a party serviced by counsel. "The critical factor in each instance (to warrant dismissal) should be the seriousness of the misbehavior, and not the presence or absence of a legal representative" (explanation added). Camps v. C & P Telephone Co., 692 F.2d 120, 124 (D.C. Cir. 1981).

forum lawsuit is fully capable of serving as a vehicle for the complete and prompt resolution of all issues concerning this matter.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5309

DONALD PRUESSMAN,

Plaintiff-Appellant,

versus

GORDON LEWIS, et al.,

Defendants-Appellees.

Appeal from the United State District Court for the Southern District of Florida

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(Filed Jan. 23, 1989)

ON PETITION(S) FOR REHEARING

BEFORE: FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the appellant, is Denied.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

ORD-41

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5309
Non-Argument Calendar

D. C. Docket No. 86-1140

DONALD PRUESSMAN,

Plaintiff-Appellant,

versus

GORDON LEWIS, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(December 19, 1988)

Before FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

Donald Pruessman filed this civil rights action in district court on May 28, 1986 alleging that his confinement in the Community Health Center of South Dade deprived him of his liberty without due process of law. In his amended complaint he stated claims under 42 U.S.C. § 1983 and state law. On the same day he filed in state court a second suit arising out of the same incident. The state proceeding also seeks relief under both state law and 42 U.S.C. § 1983.

For nearly a year and a half nothing happened: the defendants were not served, and this case lay dormant. Finally, the district court issued a sua sponte order directing that Pruessman show cause why the case should not be dismissed for lack of prosecution. Pruessman responded that he had suffered health problems and had a dispute with his attorney. On November 24, 1987 the district court quashed the show cause order but ordered plaintiff to effect service on all parties. During January 1988 he effected service on some but not all defendants. Nothing further of significance has taken place in connection with his prosecution of the case.

Defendants moved to dismiss, disclosing to the district court the pendency of the state court action. Defendants also represented that service of process had been perfected in the state action in April 1987 and that discovery had taken place and was continuing in the state action.

On February 8, 1988 the district court dismissed the case holding that plaintiff elected to pursue the state action "particularly in light of the plaintiff's egregious failure to prosecute this case."

To the extent that the district court's order indicates that a proceeding in state court is invariably a bar to proceedings concerning the same matter in federal court, it is in error. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 23-26 (1983); *Noonan South, Inc. v. County of Volusia*, 841 F.2d 380 (11th Cir. 1988). Notwithstanding the district court's questionable statement of the law, our evaluation of the

factors listed in *Colorado River* and *Moses H. Cone* establish that its order of dismissal does not require reversal. *See Collins v. Seaboard*, 681 F.2d 1333, 1335 (11th Cir. 1982). In reaching this determination we have given particular weight to the progress of the litigation in state court and the exceptional circumstances constituting Pruessman's "egregious failure to prosecute this case."

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1140-CIV-SPELLMAN

DONALD PRUESSMAN,

Plaintiff,

-vs-

GORDON LEWIS, et al.,

Defendants.

(Filed Mar. 23, 1988)

ORDER DENYING MOTION TO VACATE ORDER OF DISMISSAL

THIS CAUSE comes before the Court upon Plaintiff's Motion to Vacate Order of Dismissal. Upon careful review of the record, it is hereby

ORDERED AND ADJUDGED that this Motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 23 day of March, 1988.

/s/ Eugene Spellman
UNITED STATES
DISTRICT JUDGE

cc: all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1140-CIV-SPELLMAN

DONALD PRUESSMAN,

Plaintiff,

-vs-

GORDON LEWIS, et al.,

Defendant.

(Filed Feb. 8, 1988)

ORDER OF DISMISSAL

THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss, Quash and/or Abate/Stay Plaintiff's Complaint. Upon careful review of the record, it appears that on the same day that the Plaintiff filed the instant Action, he filed a complaint arising out of the same events and seeking substantially identical relief in state court. This was clearly not within the contemplation of Congress when it created concurrent jurisdiction for civil rights actions in 42 U.S.C. section 1343. A civil rights litigant may choose *between* a federal and state form; he may not, however, maintain two such actions concurrently. The Court finds no good faith basis for the simultaneous institution and the continued maintenance of these complaints by the Plaintiff in two different courts. *See* FED. R. CIV. P. 11. The Court notes that this is not the situation in which two different parties institute lawsuits in different courts to adjudicate claims arising out of the same transaction or incident. Moreover, particularly in light of the Plaintiff's egregious failure to prosecute this case, the Court will treat the Plaintiff as having elected to

pursue his remedies in state court. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss is GRANTED, and this case is dismissed.

DONE AND ORDERED in Chambers at Miami, Florida this 8 day of February, 1988.

/s/ Eugene Spellman
UNITED STATES
DISTRICT JUDGE

cc: all counsel of record

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

48.111 Service on public agencies and officers

(1) Process against any municipal corporation, agency, board or commission, department or subdivision of the state or any county which has a governing board, council or commission or which is a body corporate shall be served:

(A) On the president, mayor, chairman or other head thereof; and in his absence;

(b) On the vice-president, vice-mayor or vice-chairman, or in the absence of all of the above;

(c) On any member of the governing board, council or commission.

(2) Process against any public agency, board, commission or department not a body corporate or having a governing board or commission shall be served on the public officer being sued or the chief executive officer of the agency, board, commission or department.

(3) As an alternative to all of the foregoing process may be served on the person designated pursuant to § 120.071.

EMERGENCY ADMISSION

PHYSICIAN'S CERTIFICATE AND REPORT OF LAW ENFORCEMENT OFFICER

STATE OF FLORIDA, COUNTY OF Dade, FLORIDA

C.H.I. 10300 SW 216ST. Miami, Fla
(Receiving Facility and Address)

and to Officer J. Wilcox (0160)
(Law Enforcement Officer)

This is to certify that I have examined Donald Pinnisman on May 28, 1982, which was within the proceding 48 hours of the date of this certificate. In my opinion this person appears to be mentally ill and is likely to physically injure himself or others unless immediately detained. My observation upon which this conclusion is based are: Threatening violent tendencies & written note to murder; Unpredictable outbursts of anger; paranoid delusions; Refuses appropriate medication Refused To leave Hosp. Brought dwn by his Doctor. Poses a danger to his own safety.

Therefore, by virtue of the authority granted to me by Chapter 394.463 (1) (b) 3, Florida Statutes, I hereby authorize the above Law Enforcement Officer to take said person into custody and to deliver him forthwith to the receiving facility for examination and treatment.

Said Law Enforcement Officer is further requested to deliver this certificate as well as his own report below to the person authorized to receive the patient at said facility so that these documents may be a part of the above patient's clincial record.

Date May. 28 1982

Witness: Stuart L Smith

Gordon Edwards MD M.D.
Board Eligible Psychiatrist and Mental Health Prof.
pursuant to Sec. 394.455

(Address) 4950 Le Jeune Rd. Coral Gables, Fla.

REPORT OF LAW ENFORCEMENT OFFICER

STATE OF FLORIDA, COUNTY OF DADE, FLORIDA

TO 10300 SW 216 ST. (COMMUNITY HEALTH INST)
(Receiving Facility and Address)

Pursuant to Section 394.463 (1) (b) 2, Florida Statutes, requiring a written report detailing the circumstances under which DONALD RICHARD PINKISMAN was taken into custody, I report herewith as follows:

Time and Date 28 MAY 1982 6 or 7 pm Behavior Observed THOSE AS REPORTED TO THIS OFFICER IN WRITING BY PHYSICIAN GORDON LEWIS MD

81-6896

Family Members of others present when patient was taken into custody:

Name _____ Name _____

Address _____ Address _____

Relationship _____ Relationship _____

Telephone Number _____ Telephone Number _____

Indicate personal knowledge by family members and others about patient: _____

Physical Restraints, if any _____

Did the patient appear mentally ill and likely to injure himself or others if not immediately confined? _____

Delivered to Receiving Facility on BY HANDS OF GORDON 28 MAY, 19 82, at _____ a.m., p.m.

Date 28 MAY 1982

(By authority of Chapter 394.463 (1) (b), Florida Statutes)

(Law Enforcement Officer)

(July, 1972) Use Back of Page for Additional Information

"EXHIBIT A"